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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 UNITED STATES OF AMERICA, ex
8 rel., RANDOLPH PETERSON and
9 TRI-CITY RAILROAD COMPANY,
10 LLC,

11 Plaintiffs,

12 v.

13 PORT OF BENTON COUNTY, et al.,

14 Defendants.

NO. 2:17-CV-0191-TOR

ORDER GRANTING DEFENDANTS
THE CITY OF RICHLAND AND
PETER ROGALSKY'S MOTION FOR
PARTIAL SUMMARY JUDGMENT

15 BEFORE THE COURT is Defendants the City of Richland and Peter
16 Rogalsky's Motion for Partial Summary Judgment Re: Property Claims (ECF No.
17 156). A hearing was held on October 7, 2019. The Court has reviewed the record
18 and files herein, heard oral argument and is fully informed. For the reasons
19 discussed below, the Motion (ECF No. 156) is **granted**.
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ORDER GRANTING DEFENDANTS THE CITY OF RICHLAND AND PETER
ROGALSKY'S MOTION FOR PARTIAL SUMMARY JUDGMENT ~ 1

1 **BACKGROUND**¹

2 This instant motion arises out of Defendants' installation of a railroad switch
3 and a sign forbidding unauthorized users from using trackage built by the City of
4 Richland, which Plaintiffs Randolph Peterson and Tri-City Railroad Company,
5 LLC (collectively "TCRY") complain interfered with their purported property
6 interest in the trackage they leased.

7 The parties are familiar with the facts. In short, in 1998, the Department of
8 Energy gifted land called the "1100 Area" and approximately 16 miles of trackage
9 (lying inside of and south of the 1100 Area) to the Port of Benton, subject to prior
10 interests. ECF Nos. 157 at 4, ¶¶ 7-8, ¶ 6; 174 at 2. Important for this Order, both
11 the Department of Energy (in 1997, before the transfer) and the Port (in 1999, after
12 the transfer) granted the City of Richland an easement for a railroad spur inside the
13 1100 Area to connect the existing railroad wye (within the 1100 Area) to land
14 owned by the City of Richland directly to the West of the 1100 Area. ECF Nos.
15 157 at 4-5, ¶¶ 8-9; 174 at 2, 4, ¶ E (not disputing grant of easement); *see* ECF Nos.
16 13-1 at 91-98 (1997 DOE easement to City of Richland for railroad spur); 13-1 at
17 87-88 (1999 Port of Benton easement to City of Richland); 158-7 at 3

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¹ While the facts must be construed in favor of TCRY as the non-moving
20 party, the fundamental facts are not in dispute.

1 (representative sketch of easement). In 1999 through 2000, the City of Richland
2 constructed a lead track and spur pursuant to the easements (the “Horn Rapids
3 Spur”). ECF Nos. 157 at 5-6, ¶ 11; 174 at 4, ¶ F (not disputing construction dates);
4 *see* ECF No. 158-4 (representative sketch of easements).

5 Most importantly, the DOE’s 1998 transfer of the property to the Port of
6 Benton was “subject to all public utility and other easements on record, described
7 in Attachment E. . .” ECF No. 13-1 at 3. Attachment E to the Indenture agreement
8 includes a listing of easements, including the easement to the City of Richland for
9 a railroad spur. ECF No. 13-1 at 46 (Document No. 97-27682).

10 In 2002, the Port entered into a lease agreement with TCRY for trackage and
11 the use of a building. ECF Nos. 157 at 7-8, ¶ 17; 174 at 6, ¶ K. The Parties appear
12 to agree that the lease agreement included all of the 16 miles of trackage that was
13 the subject of the 1998 transfer from the Department of Energy². TCRY claims
14

15 ² The 2002 lease agreement with the Port and TCRY included a description of
16 the land and trackage in metes and bounds using the exact language from the
17 transfer from the Department of Energy, which did not include any trackage inside
18 the 1100 Area. This was, apparently, a mistake—language elsewhere in the 2002
19 Lease Agreement mentions trackage within the 1100 Area. ECF No. 13-2 at 13.
20 Counsel for the City of Richland explained this likely arose because the

1 that the leased trackage includes the right to use the short segment of track
2 previously built by the City of Richland within the 1100 Area, but this issue is not
3 material for the purposes of this Order, as the 1999 easement supersedes any
4 subsequent transfer of rights.³

5 In 2014, the Port of Benton granted the City of Richland an easement to
6 additional land south of the 1999 easement (within the 1100 Area) to accommodate
7 an auxiliary track—TCRY does not argue that this 2014 lease intruded on its
8 property interest. ECF Nos. 157 at 8, ¶ 24; 174 at 2; *see* ECF No. 158-4 at 2
9 (representative sketch highlighting the 2014 lease in green). Pursuant to the 1997,
10 1999 and 2014 easements, the City of Richland built an auxiliary track—TCRY’s
11 only issue with the auxiliary track is the installation of a switch on the existing
12 trackage that services the auxiliary track. ECF Nos. 157 at 10, ¶ 25; 174 at 9, ¶ Q

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14 Department of Energy gifted the entire 1100 Area, so a technical description of the
15 trackage within this area was not necessary for the DOE’s transfer to the Port and
16 the Port and TCRY apparently overlooked the discrepancy until 2014.

17 ³ Notably, the Court finds it instructive that the 2002 Lease Agreement
18 includes the exact description for the metes and bounds from the Department of
19 Energy, which evidences the Port’s intent to lease only the trackage subject to the
20 Department of Energy gift—not the trackage built by the City of Richland.

1 (citing to ECF No. 173-7, which only mentions a dispute concerning the
2 installation of the switch on the existing line).

3 TCRY filed suit on June 5, 2017 alleging a *qui tam* claim against the Port of
4 Benton based on the Federal False Claims Act. ECF No. 1. On April 2, 2018,
5 without leave of the Court, TCRY filed an amended complaint adding a slew of
6 other actions against the City of Richland and Peter Rogalsky, *inter alios*,
7 including claims for trespass, physical takings, regulatory takings, oppressive pre-
8 condemnation activity, unjust enrichment, nuisance, and tortious interference, *inter*
9 *alia*. ECF No. 6 at 45-68. The City of Richland and Peter Rogalsky filed this
10 Motion for Summary Judgment to dispose of these claims to the extent they rely on
11 denial of access to the Horn Rapids Spur, interference with TCRY's purported
12 rights on the Spur, or relocation of interchange activities from Richland Junction.
13 *See* ECF No. 156 at 25.

14 **STANDARD OF REVIEW**

15 A movant is entitled to summary judgment if “there is no genuine dispute as
16 to any material fact and that the movant is entitled to judgment as a matter of law.”
17 Fed. R. Civ. P. 56(a). A fact is “material” if it might affect the outcome of the suit
18 under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
19 (1986). An issue is “genuine” where the evidence is such that a reasonable jury
20 could find in favor of the non-moving party. *Id.* The moving party bears the

1 “burden of establishing the nonexistence of a ‘genuine issue.’” *Celotex Corp. v.*
2 *Catrett*, 477 U.S. 317, 330 (1986). “This burden has two distinct components: an
3 initial burden of production, which shifts to the nonmoving party if satisfied by the
4 moving party; and an ultimate burden of persuasion, which always remains on the
5 moving party.” *Id.*

6 Per Rule 56(c), the parties must support assertions by: “citing to *particular*
7 parts of the record” or “showing that the materials cited do not establish the
8 absence or presence of a genuine dispute, or that an adverse party cannot produce
9 admissible evidence to support the fact.” (emphasis added). Only admissible
10 evidence may be considered. *Orr v. Bank of America, NT & SA*, 285 F.3d 764 (9th
11 Cir. 2002). The nonmoving party may not defeat a properly supported motion with
12 mere allegations or denials in the pleadings. *Liberty Lobby*, 477 U.S. at 248. The
13 “evidence of the non-movant is to be believed, and all justifiable inferences are to
14 be drawn in [the non-movant’s] favor.” *Id.* at 255. However, the “mere existence
15 of a scintilla of evidence” will not defeat summary judgment. *Id.* at 252.

16 **DISCUSSION**

17 At the hearing, counsel for TCRY clarified that their claims subject to the
18 City of Richland’s Motion (ECF No. 156) are limited to the City of Richland’s
19 installation of the switch for the auxiliary track built in 2015 and the installation of
20 a sign. By failing to address the Motion (ECF No. 156) concerning the interchange

1 operations at Richland Junction (regulatory taking and oppressive pre-
2 condemnation activity), TCRY has abandoned these claims. Because the City of
3 Richland installed the switch pursuant to its prior easements and because the sign
4 did not interfere with TCRY's rights to the 1100 Area trackage, the Defendant's
5 Motion for Summary Judgment Re: Property Claims (ECF No. 156) is **granted**.

6 The Court finds that the switch falls fairly within the terms of the 1997
7 Easement from DOE and the 1999 Easement Deed between the City of Richland
8 and the Port of Benton, which granted the City of Richland broad rights to
9 construct a railroad spur where the switch was installed. *See* ECF No. 13-1 at 87-
10 89, 90-98; Scope of easements and profits, 17 Wash. Prac., Real Estate § 2.9 (2d
11 ed.) ("If the creating language defines the uses only generally or broadly, the
12 permitted uses are capable of gradual change over time. The best statement one
13 can make is that the permitted uses change gradually, to keep pace with the normal
14 changes in the activities carried on upon the dominant tenement, changes the
15 parties might have contemplated when the easement was created."). As such, even
16 if the 2002 Lease Agreement between TCRY and the Port purported to grant
17 TCRY use of all the trackage within the 1100 Area, its Lease was subject to the
18 1997 and 1999 easements and the installation of the switch falls under these
19 easements.

20 As for the sign, the sign states: "Entering City of Richland Railroad

1 Authorized Users Only”. ECF No. 6-4 at 20. In response to the Court’s question
2 as to what it was about the sign that conveyed to TCRY that it didn’t have
3 authorized access under the 2002 lease, counsel for TCRY stated that it was the (1)
4 language of the sign, (2) the absence of a signed track use agreement with the City
5 of Richland, and (3) an e-mail correspondence – discovered by TCRY through a
6 public records request – where the agents of the City of Richland and the Port of
7 Benton purportedly state TCRY cannot access the tracks or they would be charged
8 for criminal trespass. However, the sign merely limits *unauthorized* use—if TCRY
9 had the rights to the 1100 Area track, its use is authorized. TCRY admits it did not
10 have the right to proceed further into the City of Richland’s track, so it has no
11 lawful claim to a taking. Finally, TCRY cannot argue that an e-mail
12 correspondence that was only uncovered by a later public records request could
13 have plausibly influenced TCRY’s right to use the 1100 Area trackage.

14 In any event, TCRY does not provide evidence of any damages caused by
15 the installation of the switch or the sign. When asked what revenue TCRY was
16 deprived of by the installation of the switch, Mr. Peterson stated: “We were
17 deprived of the right to negotiate a fee[,]” explaining that “if [the City of Richland]
18 would have respected our property rights, we might have been able to negotiate
19 access to our own loop track . . . for which we still don’t have access today.” ECF
20 No. 186-1 at 16-17, 19. Further, Mr. Peterson testified that the switch and sign did

1 not prevent TCRY from servicing any customers (access to any of the businesses
2 in the area required access to trackage that is undisputedly on the City of Richland
3 land) and only identified legal and administrative fees in connection with the
4 lawsuit as expenses resulting from the switch. ECF No. 186-1 at 21-24.

5 Plaintiffs' physical taking claim fails because installing the switch and
6 erecting a sign were well within the City of Richland's prior recorded easements.
7 Plaintiffs' regulatory taking and oppressive pre-condemnation activities claims
8 have not been supported by admissible evidence establishing these claims nor
9 briefed appropriately, accordingly they are dismissed. Plaintiffs' unjust
10 enrichment, nuisance, tortious interference and §1983 claims are also predicated on
11 the argument that the City of Richland's switch and sign were wrongfully installed.
12 Since they were not installed wrongfully, these claims fail as well.


13 **ACCORDINGLY, IT IS HEREBY ORDERED:**

14 Defendants the City of Richland and Peter Rogalsky's Motion for Partial
15 Summary Judgment Re: Property Claims (ECF No. 156) is **GRANTED**.

16 The District Court Executive is directed to enter this Order and furnish
17 copies to the parties.

18 **DATED** October 10, 2019.




THOMAS O. RICE
Chief United States District Judge